

Message Text

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ARA/ECP:MDAVILA

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TO AMEMBASSY BRASILIA

INFO AMCONSUL RIO DE JANEIRO

AMCONSUL SAO PAULO

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SUBJECT: COUNTRY ELIGIBILITY FOR GENERALIZED PREFERENCES -
EXPROPRIATION AND ARBITRATION PROVISIONS

REF: A)STATE 282968; B) STATE 282967

1. SEC. 502 (B) (4) OF TITLE V OF THE TRADE ACT PROHIBITS
THE PRESIDENT FROM DESIGNATING AS ELIGIBLE FOR PREFERENCES
(GSP) ANY COUNTRY WHICH HAS NATIONALIZED THE PROPERTY OF
US CITIZENS (INCLUDING CORPORATIONS, PARTNERSHIPS OR
ASSOCIATIONS 50 PERCENT OR MORE BENEFICIALLY OWNED BY US
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CITIZENS), OR TAKEN OTHER ACTIONS WITH SIMILAR EFFECT, UN-

LESS HE DETERMINES THAT FAIR COMPENSATION IS BEING PAID, THAT SUCH COUNTRY IS "OTHERWISE TAKING STEPS TO DISCHARGE ITS OBLIGATIONS UNDER INTERNATIONAL LAW," OR THAT THE PARTIES HAVE SUBMITTED THE DISPUTE TO ARBITRATION. SEC. 502 (B) (6) APPLIES A SIMILAR PROHIBITION TO ANY COUNTRY WHICH FAILS TO ACT IN GOOD FAITH TO RECOGNIZE AS BINDING OR TO ENFORCE AN ARBITRAL AWARD IN FAVOR OF US CITIZENS (AGAIN INCLUDING CORPORATIONS, PARTNERSHIPS OR ASSOCIATIONS 50 PERCENT OR MORE BENEFICIALLY OWNED BY US CITIZENS). FYI: UNLIKE THE HICKENLOOPER AMENDMENT (SEC 620 (E) OF THE FOREIGN ASSISTANCE ACT), THE TRADE ACT REQUIRES A PRESIDENTIAL DETERMINATION TO BE MADE AND FURNISHED TO CONGRESS REGARDING THE APPLICATION OF THAT SUBSECTION TO ALL UNRESOLVED DISPUTES. END FYI.

2. WE WOULD PREFER TO CONDUCT A DETAILED INVESTIGATION OF CASES WHICH MIGHT AFFECT HOST COUNTRY ELIGIBILITY UNDER SECS. 502 (B) (4) AND (6) WHILE THE INTERNATIONAL TRADE COMMISSION (ITC) IS CONDUCTING ITS STUDY ON THE DOMESTIC ECONOMIC EFFECTS OF GSP (REF. B). FOLLOWING DISCUSSIONS WITH CONGRESSIONAL STAFFS, HOWEVER, IT IS NOT CLEAR THAT THE INTERIM WAIVER MENTIONED PARA. 4 REF. B WILL BE USED. SEVERAL ALTERNATIVE METHODS OF ACCOMPLISHING OUR OBJECTIVE ARE ALSO UNDER CONSIDERATION, BUT IT IS POSSIBLE THAT DETERMINATIONS OF COUNTRY ELIGIBILITY MAY HAVE TO BE MADE BEFORE THE ITC CAN BEGIN ITS PRODUCT ANALYSIS.

3. DEPARTMENT IS UNAWARE OF ANY CASES WHICH MIGHT AFFECT BRAZIL'S ELIGIBILITY UNDER SECS. 502 (B) (4) AND (6), EXCEPT FOR POTENTIAL CLAIM CONNECTED WITH JACK ZIPER CASE, WHICH WE BELIEVE IS STILL PENDING IN BRAZILIAN COURTS. WE WOULD APPRECIATE EMBASSY'S CAREFUL REVIEW OF ITS FILES AND ITS JUDGEMENTS AS TO APPLICABILITY OF THESE PROVISIONS TO ZIPER CASE AND ANY OTHER POSSIBLE CASES. IN VIEW OF TIME CONSTRAINTS DISCUSSED IN PARA 2, PLEASE CABLE AT LEAST PRELIMINARY REPORT ASAP.

4. THE STARTING POINT FOR EVALUATION SHOULD BE THE TEXT OF THE LEGISLATION ITSELF. UNTIL DEFINITIVE LEGAL ANALYSIS OF 502 (B) (4) IS COMPLETED, POSTS SHOULD ASSUME LIMITED OFFICIAL USE

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IT APPLIES TO ALL PROPERTY (BOTH COMMERCIAL AND NON-COMMERCIAL) OF US CITIZENS, WITHOUT REGARD TO VALUE. AS A 'RULE OF REASON,' WE ARE LIMITING THE EVALUATION TO CASES ARISING IN THE POST-WAR ERA, I.E., SINCE JANUARY 1, 1946. SINCE SOME ACTIONS (SUCH AS COERCED PARTICIPATION, SEVERE CURTAILMENT OF MANAGEMENT PREROGATIVES, OR FORCED CANCELLATION OR RENEGOTIATION OF CONTRACTS) MAY BE EXPROPRIATORY IN EFFECT WHILE STOPPING SHORT OF OUTRIGHT

TAKEOVER, POST IS REQUESTED TO INFORM DEPARTMENT OF SUCH
CASES TO ENABLE US TO EXERCISE JUDGEMENT IN DETERMINING
WHETHER "NATIONALIZATION" HAS OCCURRED WITHIN THE MEANING
OF 502 (B) (4) (A)-(C). JUDGMENTS MUST ALSO BE MADE TO
DETERMINE, INTER ALIA, WHETHER THE CRITERIA OF 502 (B) (4)
(D) ARE BEING MET, AND WHETHER "GOOD FAITH" IS PRESENT
UNDER 502 (B) (6). KISSINGER

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